and fact rather than purely an expression of opinion. *Cf.* (1917) 27 YALE LAW JOURNAL, 277. But in popular usage it is at least predominantly a statement of a fact. The deceased simply meant that he was killed by what appeared to be the deliberate act of the defendant, and his statement should not be interpreted as an attempt to give a legal opinion with respect to degrees of homicide. Once the fact is established that the homicide was the act of the defendant, other evidence is nearly always available bearing on the issues which determine its legal classification. Since the statement bears directly on the most fundamental issue of fact in the case, and the one most difficult to prove by any other evidence, it seems pure technicality to allow so slight an admixture of anything but fact to exclude it. In accordance with this view, such a statement was admitted in *State v. Mace* (1896) 118 N. C. 1244, 24 S. E. 798. *Cf. State v. Baldwin* (1890) 79 Ia. 714, 45 N. W. 297. The principal case seems an unfortunate example of a tendency from which the criminal law is now happily freeing itself.

FRAUD—MISREPRESENTATION BY SILENCE—RESCISSION.—In an action for the purchase price of a span of mules, the buyer's defense was that he had rescinded the contract because of the fraud and deceit of the seller. The trial court found that the plaintiff when he sold the mules refused specifically either to warrant their soundness or to make any statement as to their condition, but told the defendant to examine them for herself. The defendant's examination failed to reveal that one of the mules was suffering from a disease which the trial court deemed a latent and material defect. At the time of the sale the seller knew of the existence of this disease. Immediately on discovery of the disease the buyer offered to return the mules to the seller. *Held,* that the seller was not entitled to recover the purchase price. *Salmonson v. Horswill* (1917, S. D.) 164 N. W. 973. See COMMENTS, p. 691.

LIBEL AND SLANDER—MALICE IN FACT AND LAW—COMPENSATORY AND PUNITIVE DAMAGES.—In an action for libel and slander the trial court made certain detached statements from which the jury might well have inferred that the amount of the damage was within the discretion of the jury and was dependent upon the malice involved. Then the court correctly stated the Connecticut rule which gives as compensatory damages the equivalent of injuries received, and as punitive damages the expenses of the suit less taxable costs. *Held,* that there was error in the first part of the instructions, as the effect of malice in fact on compensatory damages should have been expressly limited to the actual effect of such malice in increasing the plaintiff's suffering. *Craney v. Donovan* (1917, Conn.) 102 Atl. 640.

In actions of libel and slander two kinds of malice are recognized, malice in law and malice in fact. *Coleman v. MacLennan* (1908) 78 Kan. 711, 98 Pac. 281; *Sullivan v. McCafferty* (1917, Me.) 102 Atl. 324. Malice in law is a so-called presumption of law which finds malice in the utterance of the words without legal justification. *Tim v. Hawes* (1916, N. Y. App. T.) 97 Misc. 30, 160 N. Y. Supp. 1096. This is a confusing fiction which really means that no malice is required to sustain the action. Jeremiah Smith, *Surviving Fictions* (1917) 27 YALE LAW JOURNAL, 147, 156. If the plaintiff rests his case here, he is entitled to compensatory damages. *Haines v. Schultz* (1888, Sup. Ct.) 50 N. J. L. 481, 14 Atl. 488. A majority of the states award punitive damages in case malice in fact, or actual ill-will, is shown. *Cohalan v. New York Press Co.* (1914) 212 N. Y. 344, 106 N. E. 115. In these states the absence of actual malice has been held inadmissible to affect the amount of compensatory damages. *Garrison v. Robin-*

son (1911, Ct. Err.) 81 N. J. L. 497, 79 Atl. 278. But in some states no punitive damages are allowed, and there actual malice has been admitted, not as a ground for an arbitrary increase of compensatory damages, but in order to find the exact amount of the damage inflicted, since the plaintiff may in a particular case suffer greater distress by knowing that the words were spoken maliciously. *Burt v. Advertiser N. Co.* (1891) 154 Mass. 238, 28 N. E. 1; see also Odgers, *Libel and Slander* (5th ed.) 398. This doctrine, if properly safeguarded, appears sound on principle, but it is open to some practical objections. It is believed that in many cases the plaintiff would actually suffer less from knowing that the words were spoken from prejudice and ill-will rather than from sober conviction, and it is likely that in every such case the jury would award really punitive damages under the guise of compensation. This objection, however, is less forcible in a state which allows punitive damages, whether or not such damages are limited as they are in Connecticut, and granting that there is a real relation between malice and the amount of the damage suffered, the principal case seems logical in holding, in effect, that this element should not be excluded in measuring the compensation, merely because a further allowance may be made by way of punitive damages.

MARRIAGE AND DIVORCE—CEREMONY INVALID BECAUSE OF EXISTING IMPEDIMENT—COMMON LAW MARRIAGE ON REMOVAL OF IMPEDIMENT.—Believing her prior marriage in Russia to have been invalid, the defendant contracted a second with the petitioner; early in the course of their fourteen years' cohabitation as husband and wife, the defendant's first husband died. The second husband later sought annulment on the ground that the first marriage had been valid and subsisting at the time the second was celebrated. *Held,* among other reasons for sustaining the second marriage (1) that if the parties entered on the marriage in ignorance of an existing impediment, and cohabitated matrimonially both before and after the impediment was removed, they in law became husband and wife at once on its removal; and (2) that even if the second marriage was meretricious at the start, a new consent to a common law marriage would be found from continued cohabitation and declarations of the parties that they were husband and wife, after the removal of the impediment. *Schaffer v. Krestovnikow* (1917, N. J. Ch.) 102 Atl. 246.

The holding on the first point amounts to a declaration that a common law marriage exists under the circumstances stated. The essence of common law marriage is an agreement between the parties,—mutual consent in some manner to the relation of husband and wife. Bishop, *Marriage, Div. and Sep.* (6th ed.) sec. 218. Habit and repute are only evidence from which such agreement is inferred or presumed. *Ibid.*, sec. 434. In a case like the present the mutual consent to *enter upon* the marriage relation was clearly without effect when given: an impediment existed. After the impediment's removal no such consent was ever expressed, nor is there reason to presume it; persons who believe themselves married do not consent to *enter on* marriage. The "continuing consent" sometimes spoken of, so far as it means consent to enter on the relation, is wholly a fiction. To common law marriage, then, if the principal case is sound, the only agreement necessary is to *be*—not to *become*—husband and wife. This is also the necessary result of a previous New Jersey case, in which the marriage was held to become valid on the removal of the impediment, whether or not the parties knew of the removal. *Robinson v. Robinson* (1914, Ch.) 83 N. J. Eq. 150, 90 Atl. 311. This view has not always been taken. In *Collins v. Voorhees* (1890, Ct. Err.) 47 N. J. Eq. 555, 22 Atl. 1054, the court met the problem with cold logic: consent to cohabitation which followed a ceremony could, until something further appeared, be referred only to that ceremony; if